

Audit Report

Office of People's Counsel

September 2021



OFFICE OF LEGISLATIVE AUDITS
DEPARTMENT OF LEGISLATIVE SERVICES
MARYLAND GENERAL ASSEMBLY

Joint Audit and Evaluation Committee

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Office of Legislative Audits
301 West Preston Street, Room 1202
Baltimore, Maryland 21201
Phone: 410-946-5900 · 301-970-5900 · 1-877-486-9964 (Toll Free in Maryland)
Maryland Relay: 711
TTY: 410-946-5401 · 301-970-5401
E-mail: OLAWebmaster@ola.state.md.us
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DEPARTMENT OF LEGISLATIVE SERVICES
OFFICE OF LEGISLATIVE AUDITS
MARYLAND GENERAL ASSEMBLY

Victoria L. Gruber
Executive Director

Gregory A. Hook, CPA
Legislative Auditor

September 16, 2021

Senator Clarence K. Lam, M.D., Senate Chair, Joint Audit and Evaluation Committee
Delegate Carol L. Krimm, House Chair, Joint Audit and Evaluation Committee
Members of Joint Audit and Evaluation Committee
Annapolis, Maryland

Ladies and Gentlemen:

We have conducted a fiscal compliance audit of the Office of People's Counsel (OPC) for the period beginning October 21, 2016 and ending February 21, 2021. OPC is an independent State agency that represents Maryland's residential consumers of certain regulated services (including electricity, natural gas, telephone, and private water services) on matters and in proceedings before the Public Service Commission, federal agencies, the appellate courts, and the General Assembly.

Our audit disclosed various issues related to contract procurement. OPC did not obtain required control agency approval for sole source contracts and did not always comply with State procurement regulations for competitively procured contracts.

OPC's response to this audit is included as an appendix to this report. In accordance with State law, we have reviewed the response and, while OPC generally agrees with the recommendations in this report, we identified certain instances in which statements in the response disagree with the report findings. In particular, OPC seems unwilling to seek a resolution with appropriate parties to an apparent conflict in procurement authority. In accordance with generally accepted government auditing standards, we have included an "auditor comment" within OPC's response to explain our position. We will advise the Joint Audit and Evaluation Committee of any outstanding issues that we cannot resolve with OPC.

We wish to acknowledge the cooperation extended to us during the course of this audit by OPC and its willingness to address the audit issues and implement appropriate corrective actions.

Respectfully submitted,

A handwritten signature in black ink that reads "Gregory A. Hook". The signature is written in a cursive style with a large, prominent initial "G".

Gregory A. Hook, CPA
Legislative Auditor

Background Information

Agency Responsibilities

The Office of People’s Counsel (OPC) is an independent State agency that represents Maryland’s residential consumers of certain regulated services (including electricity, natural gas, telephone, and private water services). OPC advocates on behalf of residential consumers and their interests on matters and in proceedings before the Public Service Commission, federal agencies, the appellate courts, and the General Assembly. According to the State’s records, OPC’s expenditures were approximately \$4 million during fiscal year 2020.

Findings and Recommendations

Procurements

Background

The Office of People’s Counsel (OPC) procures consulting services to assist with matters for which it does not have technical expertise in cases before various regulatory bodies and the courts. For example, these consulting services could include expert testimony from economists, accountants, telecommunication experts, or engineers on utility rate cases presented before the Public Service Commission. The need for these services may vary from year to year, depending on case activity and is often unknown in advance.

According to the State’s records, during the audit period of October 2016 through January 2021, OPC issued 254 consulting services contracts to 41 vendors with payments totaling \$6.0 million. OPC was unable to readily provide the number and amount of contracts that were sole source and competitively procured.

Finding 1

OPC did not obtain required approvals for five sole source contracts for consulting services totaling approximately \$277,000.

Analysis

OPC obtained consulting services totaling approximately \$277,000 from five vendors using the sole source procurement method without approval from the Office of the Attorney General (OAG) and the Department of Budget and

Management (DBM) or the Department of General Services (DGS)¹, as required by State procurement regulations.

Our test² of five sole source contracts awarded by OPC from January 2019 to March 2020, disclosed that the contracts were not submitted to the appropriate agencies for review and approval. Specifically, none of these contracts were submitted to DBM or DGS for approval. Furthermore, two of these contracts, totaling \$77,000, were also not submitted to the OAG for approval.

State procurement law and regulations allow agencies to use the sole source procurement method when there is threatened or pending litigation (which applied to all five contracts) with the approval of OAG. In addition, approval is required from DGS (or from DBM prior to October 2019) for contracts such as these that were \$100,000 or less, or from the Board of Public Works (BPW) for contracts greater than \$100,000.

We were advised by OPC and DGS management that these procurements were exempt from control agency approval, other than by OAG, due to the confidential nature of the services provided by these contracts; citing an OAG opinion (from 1989). However, this interpretation appears to conflict with established BPW and DGS procurement authority. In addition, it does conflict with advice we received from BPW staff, who advised us that State procurement law and regulations related to confidential services do not preclude control agency approval.

Recommendation 1

Due to the apparent contradictions on the interpretation of State law and the aforementioned OAG opinion, we recommend that OPC consult with all parties (the OAG, DGS, and BPW) to resolve the issue, and to ensure that it obtains all necessary control agency approvals. Based on the conclusion obtained from these entities

- a. ensure that sole source procurements are approved by the appropriate agencies; and**
- b. seek retroactive approval from the appropriate control agencies for previously awarded unapproved sole source contracts, as required.**

¹ Effective October 1, 2019, procurement control authority was transferred from the Department of Budget and Management to the Department of General Services.

² Our selection of test items was based on the significance of the vendor payments during the audit period.

Finding 2

OPC did not always comply with State procurement regulations for competitive procurements.

Analysis

OPC did not always comply with State procurement regulations for competitive procurements including evaluation criteria, time to receive bids, and bid security. Our test³ of four consulting contracts competitively procured between July 2018 and March 2019, totaling \$148,000 disclosed the following conditions for each of the four contracts.

- The request for proposals (RFP) did not indicate the relative importance of the technical and financial components in the contract award process. As a result, OPC could not fully demonstrate how the technical and financial components of the RFP were evaluated when awarding the contracts and whether the contract awards were the most advantageous to the State. State procurement regulations require that RFPs include the relative importance of each evaluation component to be considered in the award.
- The bidding period for the RFPs, which is the period from when the RFPs were issued until when the bids were due, was less than the 20 day minimum bidding period required by State regulations. Specifically, for these 4 contracts, the bid period ranged from 12 to 18 days. A shortened bidding period may limit competition and not provide the best value for the State.

In addition, OPC had not established adequate controls over electronically submitted vendor bids. OPC routinely instructed vendors to submit their competitive bids directly to the email account of a management employee and did not require the bid submissions to be password protected. Consequently, bids could be opened without detection prior to the formal bid opening and confidential competitive bid information could be accessed and disclosed without detection to other prospective bidders prior to the bid due date. State regulations require that competitive sealed bid proposals be secured until the established bid due date.

Recommendation 2

We recommend that for competitive procurements OPC

- a. document in the RFP, the relative importance of each evaluation criteria;**
- b. provide the minimum required bidding period; and**

³ Our selection of test items was based on the significance of the vendor payments during the audit period.

c. adequately secure bids prior to opening.

Audit Scope, Objectives, and Methodology

We have conducted a fiscal compliance audit of the Office of People's Counsel (OPC) for the period beginning October 21, 2016 and ending February 21, 2021. The audit was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

As prescribed by the State Government Article, Section 2-1221 of the Annotated Code of Maryland, the objectives of this audit were to examine OPC's financial transactions, records, and internal control, and to evaluate its compliance with applicable State laws, rules, and regulations.

In planning and conducting our audit, we focused on the major financial-related areas of operations based on assessments of significance and risk. The areas addressed by the audit included procurements, disbursements, and payroll.

Our assessment of internal controls was based on agency procedures and controls in place at the time of our fieldwork. Our tests of transactions and other auditing procedures were generally focused on the transactions occurring during our audit period of October 21, 2016 to February 21, 2021, but may include transactions before or after this period as we considered necessary to achieve our audit objectives.

To accomplish our audit objectives, our audit procedures included inquiries of appropriate personnel, inspections of documents and records, tests of transactions and to the extent practicable, observations of OPC's operations. Generally, transactions were selected for testing based on auditor judgment, which primarily considers risk, the timing or dollar amount of the transaction, or the significance of the transaction to the area of operation reviewed. As a matter of course, we do not normally use sampling in our tests, so unless otherwise specifically indicated, neither statistical nor non-statistical audit sampling was used to select the transactions tested. Therefore, unless sampling is specifically indicated in a finding, the results from any tests conducted or disclosed by us cannot be used to project those results to the entire population from which the test items were selected.

We also performed various data extracts of pertinent information from the State's Financial Management Information System (such as revenue and expenditure data) and the State's Central Payroll Bureau (payroll data). These extracts are performed as part of ongoing internal processes established by the Office of Legislative Audits and were subject to various tests to determine data reliability. We determined that the data extracted from these sources were sufficiently reliable for the purposes the data were used during this audit. Finally, we performed other auditing procedures that we considered necessary to achieve our audit objectives. The reliability of data used in this report for background or informational purposes was not assessed.

OPC's management is responsible for establishing and maintaining effective internal control. Internal control is a process designed to provide reasonable assurance that objectives pertaining to the reliability of financial records; effectiveness and efficiency of operations, including safeguarding of assets; and compliance with applicable laws, rules, and regulations are achieved. As provided in *Government Auditing Standards*, there are five components of internal control: control environment, risk assessment, control activities, information and communication, and monitoring. Each of the five components, when significant to the audit objectives, and as applicable to OPC, were considered by us during the course of this audit.

Because of inherent limitations in internal control, errors or fraud may nevertheless occur and not be detected. Also, projections of any evaluation of internal control to future periods are subject to the risk that conditions may change or compliance with policies and procedures may deteriorate.

Our reports are designed to assist the Maryland General Assembly in exercising its legislative oversight function and to provide constructive recommendations for improving State operations. As a result, our reports generally do not address activities we reviewed that are functioning properly.

This report includes findings relating to conditions that we consider to be significant deficiencies in the design or operation of internal control that could adversely affect OPC's ability to maintain reliable financial records, operate effectively and efficiently, and/or comply with applicable laws, rules, and regulations. Our report also includes findings regarding significant instances of noncompliance with applicable laws, rules, or regulations. Other less significant findings were communicated to OPC that did not warrant inclusion in this report.

OPC's response to our findings and recommendations is included as an appendix to this report. As prescribed in the State Government Article, Section 2-1224 of

the Annotated Code of Maryland, we will advise OPC regarding the results of our review of its response.

APPENDIX

OPC

OFFICE OF PEOPLE'S COUNSEL

State of Maryland

6 ST. PAUL STREET, SUITE 2102
BALTIMORE, MARYLAND 21202
WWW.OPC.MARYLAND.GOV

BRANDI NIELAND
DIRECTOR, CONSUMER
ASSISTANCE UNIT

GAIL V. TUCKER
ADMINISTRATIVE
PROGRAM MANAGER

DAVID S. LAPP
PEOPLE'S COUNSEL
DAVIDS.LAPP@MARYLAND.GOV

WILLIAM F. FIELDS
DEPUTY PEOPLE'S COUNSEL

JOSEPH G. CLEAVER
DEPUTY PEOPLE'S COUNSEL

September 13, 2021

Gregory A. Hook, CPA
Legislative Auditor
Office of Legislative Audits
301 West Preston Street
Room 1202
Baltimore, Maryland 21201

Dear Mr. Hook:

Enclosed please find the Office of People's Counsel's responses to the draft Legislative Auditor's Report for the period beginning October 21, 2016 and ending February 21, 2021. OPC has already introduced changes to its procedures to address concerns identified in the audit.

Thanks to you and your professional staff for the manner in which the audit was conducted and for the constructive recommendations that were made as a result of the audit. Should you have any questions or need additional information, please contact me at 410-767-8162, or davids.lapp@maryland.gov.

Sincerely,



David S. Lapp, Esq.
People's Counsel

DSL/gvt
Enclosure

C: William F. Fields, Deputy People's Counsel
Gail V. Tucker, Admin Program Manager

Office of People's Counsel

Agency Response Form

Procurements

Finding 1

OPC did not obtain required approvals for five sole source contracts for consulting services totaling approximately \$277,000.

Due to the apparent contradictions on the interpretation of State law and the aforementioned OAG opinion, we recommend that OPC consult with all parties (the OAG, DGS, and BPW) to resolve the issue, and to ensure that it obtains all necessary control agency approvals. Based on the conclusion obtained from these entities

- a. ensure that sole source procurements are approved by the appropriate agencies; and**
- b. seek retroactive approval from the appropriate control agencies for previously awarded unapproved sole source contracts, as required.**

Agency Response

Analysis	
Please provide additional comments as deemed necessary.	<p>OPC disagrees with this finding in part. OLA's finding is that OPC did not obtain required approvals for certain contracts. OLA's finding is based on its conclusion that OPC is required to obtain approval of sole source contracts from the Department of Budget and Management (DBM) or the Department of General Services (DGS) and the Office of the Attorney General (OAG). OPC agrees that approval of OAG is required for sole source contracts. However, OPC does not agree that it requires approval of DBM or DGS for sole source contracts.</p> <p>OLA's conclusion that OPC is required to obtain approval from DBM or DGS is not supported by State Finance and Procurement Article (SF) § 13-107. SF §13-107 establishes two methods for sole source procurement. Under SF §13-107(b) an agency is able to procure the services of a contractor in connection with pending or threatened litigation "with prior written approval of the Attorney General." This type of sole source procurement does not require "any other approval required by law" as set forth in SF §13-107(a).</p> <p>The Maryland Attorney General issued an Opinion addressing this issue and found that "the award of a contract for expert witness or other consultant services under the 'sole source' procurement provisions of SF § 13-107(b) requires the approval of the Attorney General only."¹ A procurement under SF § 13-107(b)(1) contains no general requirement of</p>

¹ 74 Md. Atty. Gen. 230, 236 (1989).

Office of People’s Counsel

Agency Response Form

	<p>approvals “required by law,” but only a specific requirement that the contracting unit obtain “the prior written approval of the Attorney General.” In its Opinion, the Attorney General found that “this difference between the wording of the approval provisions evidences a legislative intent to establish substantively different approval procedures.”² The Opinion notes that had the General Assembly intended to require that contracts awarded under SF § 13-107(b) be subject to the same procurement approvals applicable to contracts awarded under the other procedures, it would have utilized the same general language that it used in those other provisions, including the sole source authorization articulated within the very same section in SF § 13-107(a). “This contrasting language indicates that the only approval required for the award of those contracts under SF § 13-107(b) is the approval of the Attorney General.”³ The Opinion further observed that SF § 13-107(b) applies only to contracts that relate to pending or threatened litigation, the acquisition of real property, or collective bargaining – all matters that are adversarial in character and that require confidentiality. As the Attorney General advised: “The public nature of the usual procurement process would breach the confidentiality of the contracts to which SF § 13-107(b) applies.”⁴ For these reasons, the Attorney General found that it was the intent of the General Assembly that sole source procurements awarded under SF § 13-107(b) be subject to “special review and approval process,” including exemption from the normal requirements of DGS or DBM review, and “approval of the Attorney General alone.”⁵</p> <p>For that part of Finding 1 that pertains to two contracts for which OPC did not obtain OAG approval, OPC agrees with OLA’s findings. OPC did not obtain approval because of a misunderstanding of requirements as they pertain to small procurements. With its new understanding OPC will seek OAG approval for all future sole source contracts.</p>		
Recommendation 1a	Agree	Estimated Completion Date:	9/1/2021
Please provide details of corrective action or explain disagreement.	OPC will obtain approval of OAG for sole source contracts.		
Recommendation 1b	Agree	Estimated Completion Date:	11/1/2021

² *Id.* at 234.

³ *Id.* at 234.

⁴ *Id.* at 235.

⁵ *Id.* at 235 -236.

Office of People's Counsel

Agency Response Form

Please provide details of corrective action or explain disagreement.	OPC agrees to seek retroactive approval as necessary from OAG per the recommendation.
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Auditor's Comment: OPC's response disagreed with certain aspects of our recommendations because of a 1989 Opinion of the Attorney General that these types of procurements did not require control agency approval. We were aware of the Opinion, which is referenced in our finding. However, as noted in the finding, the OAG Opinion appears to contradict established BPW/DGS procurement authority and the advice that we received from BPW procurement staff. Therefore, we continue to believe that OPC should consult with the OAG and BPW to resolve the contradiction and comply with the related conclusions.

Office of People’s Counsel

Agency Response Form

Finding 2
OPC did not always comply with State procurement regulations for competitive procurements.

- We recommend that for competitive procurements OPC**
- a. document in the RFP, the relative importance of each evaluation criteria;**
 - b. provide the minimum required bidding period; and**
 - c. adequately secure bids prior to opening.**

Agency Response			
Analysis			
Please provide additional comments as deemed necessary.	OPC does not have concerns with the factual accuracy of this item.		
Recommendation 2a	Agree	Estimated Completion Date:	9/1/2021
Please provide details of corrective action or explain disagreement.	OPC will revise its RFPs to include the relative importance of the evaluation criteria.		
Recommendation 2b	Agree	Estimated Completion Date:	10/1/2021
Please provide details of corrective action or explain disagreement.	OPC will revise its Office protocols to require that RFP responses are not due sooner than 20 days from when they are issued.		
Recommendation 2c	Agree	Estimated Completion Date:	9/1/2021
Please provide details of corrective action or explain disagreement.	OPC has created a separate email address for receipt of responses to RFPs. None of the OPC employees who will be evaluating the RFP will have access to that email box or the proposals until after the deadline for responses to the RFP.		

AUDIT TEAM

Heather A. Warriner, CPA
Audit Manager

Sandra C. Medeiros
Senior Auditor